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NO. 82-2013

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE STATE OF TEXAS, ET AL.,
Petitioners

VS.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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LIST OF PARTIES

PETITIONERS:

The State of Texas, the Texas Alcoholic Beverage Commission, and W.S. McBeath, Administrator of the Texas Alcoholic Beverage Commission

RESPONDENT:

United States of America

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PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Petitioners submit this Reply Brief to Respondent's Brief in Opposition pursuant to Supreme Court Rule 22.5[1].

THE SUPREMACY CLAUSE DOES NOT SUPPORT RESPONDENT'S POSITION THAT PETITIONERS ARE PRECLUDED FROM REGULATING THE ACTIVITIES OF NONRESIDENT SELLERS AND TEXAS WHOLESALERS.

1. Petitioner, Licensed Beverage Distributors Association, in No. 82-2003, is also submitting a Reply to the Brief for the United States in Opposition. The same issues are involved in No. 82-2003 as in No. 82-2013. Therefore, Petitioners herein adopt the arguments of Petitioner's Reply brief being submitted in No. 82-2003.

Besides failing to address many of the issues cited in the Petition for Writ of Certiorari, Respondent cites *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) and *Paul v. United States*, 371 U.S. 245 (1963) in an effort to uphold the Court of Appeals' holding under the Supremacy Clause. In *Leslie Miller*, which did not involve the Twenty-first Amendment, this Court did not allow Arkansas to impose its licensing requirements over a federal contractor since that would give a state "virtual power of review over the federal determination of 'responsibility' and ... thus frustrate ... federal policy of selecting the lowest responsible bidder." 352 U.S. at 190.

Paul, also a non-Twenty-first Amendment case, involved a California regulation which prescribed minimum wholesale and retail prices for milk to be sold by distributors to merchants for consumption on the premises. 371 U.S. at 250. This Court found that the California policy defeated the obligation of federal officers to procure supplies at the lowest cost by having a state official fix the price on the basis of factors not specified in federal law. *Id.* at 253.

Petitioners do not seek to regulate any military activities on bases located within Texas borders, and Petitioners also do not seek to fix any prices on alcoholic beverages purchased by NFIs. While Respondent cites Article I, Section 8 of the federal Constitution relating to conduct of the military as a matter of exclusive federal concern (Brief, 5, ftn.5), Petitioners do not question Respondent's constitutional authority to govern the armed forces. However, Petitioners do not concede Texas' unquestioned authority to regulate the activities of nonresident sellers and Texas wholesalers in transporting alcoholic beverages across Texas borders, especially when Respondent challenges that regulation only in the name of "cheapest prices" for NFIs.

Unlike *Paul* and *Leslie Miller*, this case presents a valid state interest not in conflict with the military. The reason for Petitioners' regulation of nonresident sellers and Texas wholesalers is to prevent unlawful diversion of liquor to protect the health and safety of Texas citizens from possibly illicit or untested liquor.

Not only *United States v. Tax Commission of Mississippi*, 412 U.S. 363 (1973), but also Respondent's own Navy Regulation, refute Respondent's contention that military procurement is a matter of exclusive federal concern. As this Court pointed out in *Mississippi*, a State has the power to regulate the movement of "alcoholic beverages through its territory to the bases or from the bases back into its jurisdiction..." *Id.* at 371. The flow of alcoholic beverages from nonresident sellers to NFIs would be through Texas into the bases, and diversion of liquor from the NFIs into the State would constitute transportation of liquor back into Texas. Navy Regulation 1150, 32 C.F.R. § 700.1150, dealing with the "introduction, possession, or use of alcoholic liquors ... on board any ship ... or vehicle of the ... Navy" provides in pertinent part:

> Whenever alcoholic liquor is brought on board any ship ... for transportation for personal use ashore, the person who brings it on board shall ... file with the officer in command or officer in charge of the ship...a statement of the quantity and kind of alcoholic liquor brought on board ..., together with his certification that its importation will be in compliance with customs and internal revenue laws and regulations and *applicable State or local laws at the place of debarkation.* (Emphasis added).

Obviously, *Mississippi* and Navy Regulation 1150 certainly do not endorse Respondent's contention that NFI liquor procurement is an exclusive federal concern.

DOD REGULATION 32 C.F.R. § 261.4(c) DOES NOT PREEMPT TEXAS' ALCOHOLIC BEVERAGE CODE, AND § 261.4(c) DOES NOT MEET THE FEDERAL PREEMPTION STANDARDS.

Since Respondent has never accurately defined the conflict between the Texas Alcoholic Beverage Code (Code) and § 261.4(c), it blindly states: "But a conflict exists and requires the State's law to give way." (Brief 6, ftn. 7). Respondent's limp contention is in response to Petitioners' view that the Code and the DOD Regulation do not conflict. (Pet. for Writ, 21). In buttressing its artificial creation of conflict, Respondent argues that since the Secretary of Defense is authorized to adopt regulations governing consumption of liquor on military bases, regulations governing procurement are authorized since they affect consumption. Respondent continues with the *non-sequitur* by arguing that the regulation "was intended to create a federal standard with respect to the *cost* of liquor." (Brief, 6, emphasis added).

The Universal Military Training Act (Act) (Pet. App. F-1), concerned with raising and maintaining armed forces and establishing a universal military training program,[2] does not address liquor costs. The Act addresses regulations governing the sale or consumption of alcoholic beverages to or by Armed Forces members at or near any camp. To say that regulations governing procurement affect regulations governing consumption is merely Respondent's excuse for disregarding the language, "at or near any camp."

Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 102 S.Ct. 3014 (1982), cited by Respondent in support of

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2. 1951 U.S. Code Cong. & Admin. Service, Vol. 2, 1472, House Report No. 271.

its preemption claim, instead supports Petitioners' position that the Act and § 261.4(c) do not conflict with Texas law and therefore, do not preempt the Code. *Fidelity* involved a Federal Home Loan Bank Board (Board) regulation under section 5(a) of the Home Owners' Loan Act of 1933 (HOLA) which enabled a federal savings and loan association to declare due and payable sums secured by the association's security instrument if any part of the real property securing the loan is sold or transferred by the borrower without the associations prior written consent, otherwise known as a due-on-sale clause. 102 S.Ct. at 3019. As the Board further stated, these due-on-sale practices would be governed "exclusively by Federal law", and conflicting state laws would not bind federal associations. *Id.* Section 5(a) of HOLA empowered the Board to provide by rules and regulations for the organization, incorporation, examination, operation, and regulation of federal savings and loan associations. *Id.* at 3018. The respondent argued that California's *Wellenkamp* doctrine (102 S.Ct. 3020) precluded exercise of the federal due-on-sale clause. This Court answered:

> Absent explicit pre-emptive language, Congress' intent to supersede state law ... may be inferred because 'the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' ...

Unlike the actual federal-state conflict in *Fidelity* and § 5(a)'s broad language which did not limit the Board's authority (*Id.* at 3025-6), there is no explicit pre-emptive language in the DOD regulation. In fact, it calls for

cooperation by the DOD with *all* duly constituted regulatory officials in the purchase of all alcoholic beverages for resale at any base so as to obtain the most advantageous *contract* (Pet. App. H-1). Furthermore, the scheme of federal regulation is not so pervasive in § 261.4(c) so as to make reasonable the inference that Congress left no room for the States to supplement it. Cf. *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275 (1972); *National Railroad Passenger Corporation v. Miller*, 358 F. Supp. 1321 (1973), *aff'd without written opinion*, 414 U.S. 948; *Castlewood International Corp. v. Simon*, 596 F.2d 638 (5th Cir.1979), judgment vacated, 446 U.S. 949 (1980), on remand, 626 F.2d 1200 (5th Cir. 1980).

In fact, via the Twenty-first Amendment itself and *Castlewood's* "vantage point of presumed state power" and the "great deference [to] be accorded a comprehensive state regulatory scheme" (Pet. for Writ, 27),the field of alcoholic beverage regulation is not one where the federal interest is dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

Supporting Petitioner's argument on "no conflict," *Rice v. Norman Williams Co.*, 102 S.Ct. 3294, 3299 (1982), advises: "the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes." Furthermore, a hypothetical conflict between the state and federal statutes would be "insufficient to invalidate a state statute pursuant to the Supremacy Clause." *Id.* at 3301.[3] Respondent's

3. *Rice* concerned a California statute providing that licensed importers of distilled spirits cannot purchase or accept delivery of those products unless designated as an authorized importer of such brand by the owner. The California statute was challenged as conflicting with § 5(a) of the Federal Alcoholic Administration Act, 27 U.S.C. § 205(a), which prohibits a distiller from establishing exclusive retail outlets. 102 S.Ct. 3298, 3301.

hypothetical conflict is shown by Mr. Hotaling's undocumented comparison between liquor prices for Texas NFIs and liquor prices for NFIs in other states. (Brief, 3, ftn. 4). This testimony pales against that of Mr. Francke, the mess liaison officer at Chase Field, who did not know whether National Distillers of New York provided cheaper prices than a Texas wholesaler. (III.R., 32).

Consistent with the directive to procure liquor at the most advantageous contract, prices and *other factors* considered, the record reflects those factors relative to "most advantageous contracts" with Texas wholesalers. (III.R., 29,36, 37,41,56). Therefore, Petitioners have not sought to use the Twenty-first Amendment to increase the authority of the states to regulate the affairs of the federal government, as Respondent argues (Brief, 7), but only to continue their Twenty-first Amendment powers under the Code. There is no conflict between federal and state law which would require the curtailment of the Code's application to Texas permittees. Congress has conveyed no clear purpose to significantly change the Federal-State balance. Cf. *Heublein v. South Carolina Tax Commission*, 409 U.S. at 281-2.

RESPONDENT'S RELIANCE ON "NO DIVERSION" IS AS GROUNDLESS AS THE COURT OF APPEALS' "EXCLUSIVE ZONE OF FEDERAL JURISDICTION."

Respondent references the Court of Appeals' observation that a State has a legitimate interest in protecting against diversion of liquor from a federal enclave, but that Texas laws were not an effort to deal with those problems. (Brief, 7, ftn. 8). Respondent cites the State's repeated references in bulletins to the gallonage tax and its failure to cite instances of diversion and then makes the inconsistent observation that, "the tax im-

munity doctrine, however, is not involved in this case." (Brief, 8). If Respondent is not attacking the gallonage tax (which it did) then what is being attacked, without any lawful justification, is Petitioners' right to regulate nonresident sellers and Texas wholesalers under the Twenty-first Amendment. As stated in *Heublein*, a regulatory scheme that serves legitimate State purposes, other than the state's taxing the firm's income, is not evading federal law, but is pursuing permissible ends which Congress did not address. 409 U.S. at 281-2.

Or, as this Court observed in *Mississippi*,

> [A] State may, *in the absence of conflicting federal regulation*, properly exercise its police powers to regulate and control such shipments during their passage through territory insofar as necessary to prevent the 'unlawful diversion' of liquor 'into the internal commerce of the State,' ... 412 U.S. at 377. (Emphasis added).

To argue, as does Respondent, that actual instances of diversion are required for a State to regulate the transportation of liquor is tantamount to arguing that a stop sign is necessary only after numerous collisions at an intersection.

With the failure of the Military Training Act to address Petitioners' regulation of nonresident sellers and Texas wholesalers, it is not a matter, under paragraph (2) of § 261.4(c), of the regulation's policy of "cooperation" being construed as a legal obligation to submit to State control (Pet. App. H-1), but a matter of Congress having chosen not to significantly change the Federal-State balance under the Twenty-first Amendment and the Code. Cf. *Heublein*, 409 U.S. at 281. Thus, this case cannot be decided based on the State's not reserving the right to regulate alcoholic beverages on those enclaves subject to concurrent jurisdiction. (Pet. App. A-10, ftn.

17). Reservation of this right is irrelevant under *Mississippi;* the key is absence of conflicting federal law.

In response to Petitioners' vigorous enforcement of police powers to prevent unlawful diversion of liquor (III.R.,102, 119, 123, 165-7), Respondent endorses two types of liquor flowing through Texas, that sold in accordance with the Code and that which is not. More importantly the latter illicit liquor would not be subjected to any testing or other safeguards designed to protect the health and safety of Texas residents, a totally senseless result in light of the Twenty-first Amendment and the lack of any Federal-State conflict.

Respondent further argues that the Court of Appeals, in using the term "exclusive zone of federal jurisdiction" referred to "subject matters of exclusive federal concern (such as federal military procurement) and not to matters of geography." (Brief, 5-6, ftn. 6). However, in *United States v. Tax Commission of Mississippi, supra,* and *Collins v. Yosemite Park & Curry Co.,* 304 U.S. 518 (1938), the exclusive zones were represented by exclusive and concurrent jurisdiction military bases and by an exclusive federal enclave located within California, respectively. (Pet. App. A-9).

If the Court of Appeals did mean NFI procurement of liquor to be a matter of exclusive federal concern, then its opinion conflicts with that in *Mississippi* wherein by Regulation 25, Mississippi gave the military the option to purchase from the State or directly from the distiller. 412 U.S. at 365.

Thus, Mississippi, and not the United States, determined the choices the military had in purchasing its liquor. This Court found no problem with Regulation 25 despite of the fact that 32 C.F.R. § 261.4(c) was urged as the basis for precluding Mississippi's interference with federal procurement. Cf. *Id.* at 367. However, the

Court did find that Mississippi's required mark-up on sales to the military was not an effort to deal with problems of diversion of liquor from out-of-state shipments destined for military bases. *Id.* at 375, 378. Texas, as Respondent concedes, has no such unconstitutional tax on the military nor has it advanced its constitutional tax as the effort to deal with diversion.

Respondent, left with no evidence on exclusive or concurrent jurisdiction regarding Chase Field, has tried to "hang its hat" on an erroneous Court of Appeals opinion which describes military procurement as an area of exclusive federal concern, contrary to this Court's rulings in *Mississippi* and *Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261 (1943). As shown by *Penn Dairies* and *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926) (Pet. for Writ, 29-30) Respondent has merely been *affected* by burdens of state regulation and state taxation of Texas liquor permittees which are normal incidents of both governments operating in the same territory. 318 U.S. at 270-1. Without a conflict between federal law and state law, it must be left up to Congress to remove those burdens. Until Congress so chooses, Petitioners' regulation of nonresident sellers and Texas wholesalers is a valid exercise of their Twenty-first Amendment powers.

Respondent has presented no reasons for not granting Writ. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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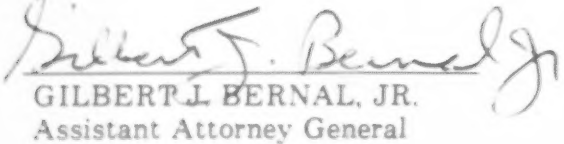

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court, and that on this 30 day of September, 1983, three copies of Petitioners' Reply to Brief for the United States in Opposition have been served on all parties required to be served by United States mail, first class postage prepaid, addressed as follows:

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